

Limiting COVID-19's Economic Impact On Your Business

While the most important issue is ensuring public safety, the ensuing financial hardship of this COVID-19 pandemic will be felt for months, if not years. From sports arenas, to local bars and restaurants, to the global supply chain, every business will be affected. It is worth considering how to mitigate the economic impact that this disease is wreaking on businesses.

Business Interruption Insurance

One provision that is often included in commercial insurance is called business interruption insurance, which typically provides relief for certain losses — including business income — caused by an insured peril, which falls within the scope of the policy, and those perils vary significantly from policy to policy. Often, this policy requires business interruption to occur as a result of actual physical damage to commercial facilities, such as a fire, flood, natural disaster or earthquake. In the case of COVID-19, a direct physical loss might not be clear, but situations could arise that place a commercial facility physically off-limits, such as contamination that prevents use of the facility. In *Gregory Packaging, Inc. v. Travelers Property and Casualty Company of America*, No. 12-cv-04418, 2014 U.S. Dist. LEXIS 165232 (D.N.J. Nov. 25, 2014), the court agreed with the claimants that the release of ammonia that rendered the buildings uninhabitable constituted a “direct physical loss” sufficient to trigger the business interruption insurance coverage. An increasing number of recent lawsuits have challenged the insurance companies' blanket denials of COVID-19 business interruption claims

After the Severe Acute Respiratory Syndrome (“SARS”) outbreak in 2003, Mandarin Oriental International Ltd. received \$16 million from its insurers to pay for business interruption losses from hotel cancellations as many around the world ceased travel to areas affected by SARS. In a separate case, the Court of Final Appeal in Hong Kong held that the contract provision at issue that required coverage for claims for “notifiable human infectious or contagious disease” limited the insurer’s liability to losses incurred after such disease was required by law to be notified to an authority. Since SARS was added as a disease required to be disclosed after the insured had already incurred economic damages, losses incurred prior to that “trigger date” were excluded. On January 7, 2020, Hong Kong added COVID-19 to its list of notifiable diseases. The United Kingdom did the same as of March 4, 2020, specifically to “help companies seek compensation through their insurance policies in the event of any cancellations they may have to make as a result of the spread of the virus.”

The insurance industry responded to the SARS outbreak with a new standard exclusion in commercial policies for losses “from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.” States are beginning to take action in response to these exclusions as the economic consequences of the COVID-19 pandemic mount. On March 16, 2020, New Jersey introduced a new bill that would effectively ignore any “virus” exclusions in business interruption policies and require insurers to pay claims. On March 10, 2020, New York’s Department of Financial Services issued a letter to all regulated entities requiring each of them, in part, to provide to policyholders information regarding “the policies it has issued and explain the coverage each policy offers in regard to COVID-19.” Responses were due on March 18, 2020. Other hard hit states, like Washington and California, are likely to take some action as well.

Businesses often have a general impression that business interruption losses due to COVID-19 are not covered. But that is not necessarily true. The specific policy language is critical in determining whether coverage for business interruption losses is available and whether a particular loss is covered. It is critical that a business provide a copy of its insurance policy to a knowledgeable attorney who will perform a thorough review of the policy language, the scope of coverage and of the exclusions to that coverage. It is also helpful to provide copies of prior policies for review of any changes to the policy terms.

Relying solely upon an insurance company's interpretation of its own policy that no “physical damage” has occurred due to the COVID-19 pandemic may result in a waiver of a valid business interruption claim. Policies typically include a strict time limit for submitting a written claim to the insurer and a formal denial of the claim as prerequisites to filing suit to require coverage. Triggering events for business interruption coverage are varied, but waiting to assert a claim may be fatal to a business's ability to contest the denial of business interruption coverage in court.

Force Majeure

Contracts for the sale of goods governed by the Uniform Commercial Code allow a seller to raise impracticability as a defense by proving that (1) an unforeseeable event occurred; 2) the nonoccurrence of the event was a basic assumption underlying the agreement; and (3) the event rendered performance impracticable. Service contracts may contain a provision known as a “force majeure” clause. Simply put, such provision excuses one party’s performance for extremely disruptive actions outside of that party’s control that make performance too onerous or even impossible. In that sense, it allows a party to avoid prospective costs associated with an agreement but does not allow for recouping sunk costs.

Typical force majeure events include fire, flood, natural disaster, war or government action that prevents performance. If a triggering event occurs, one party may exercise its right not to perform while it is unable to do so. But courts may require that the party relying on such provision demonstrate that it was in a position to perform absent the triggering event. The response to the global pandemic — from the imposition of government mandated closures and shelter-in-place orders to other recommendations that severely limit economic activity — might qualify as such an event. A careful review of relevant contracts by a knowledgeable contract attorney is needed to evaluate whether an event may constitute force majeure.

Event Cancellation Insurance

Whereas with business interruption insurance, the evaluation of the long-term risk of a complete work stoppage resulting from a catastrophic event may be more complex, assessing the risk of cancellation for a single event may be more straightforward. This type of insurance is useful for concerts, conferences, festivals, sporting events, trade shows and conventions. Event cancellation insurance policies may allow affected entities to recoup some or all of its expenses incurred by a force majeure event. As such, it is useful to procure such insurance in conjunction with well-drafted force majeure clauses. If filing a claim becomes necessary, or if a claim is denied, a business should provide a copy of its insurance policy to a knowledgeable attorney who will perform a thorough review of the policy language, the scope of coverage and the exclusions to that coverage.

We intend to closely monitor the legal and business implications associated with the global fallout from the COVID-19 outbreak. The Enterprise Law Group team is prepared to answer any questions you may have.